U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of:	
ISAAC YOUNG Claimant,	
v.	
STEVENS SHIPPING & TERMINAL CO., Employer,	Date: July 31, 2000 Case No. 1999-LHC-286
and	
ARM INSURANCE SERVICES, Carrier.	

Appearances:

Benford L. Samuels, Jr., Esq.
For the Employer

L. Jack Gibney, Esq.
For the Claimant

Before: Mollie W. Neal
Administrative Law Judge

DECISION AND ORDER - - GRANTING BENEFITS

This matter arises out of a claim for workers' compensation benefits filed by Isaac Young (“Claimant”) under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. § 901 et seq.)("the Act") for neck injuries sustained in the course of his employment with Stevens Shipping & Terminal Co. (“Employer”) on October 17, 1997.

A hearing was held before the undersigned in Jacksonville, Florida on April 7, 1999. Claimant's exhibits (“CX”) 1 through 3 and Employer’s exhibit (“EX”) 1 was admitted without objection. (Tr. 5-6).[1] On January

[1] Employer’s Exhibit 2 included two exhibits which consist of the office notes of Dr. Jawed Hussain, and the job descriptions of nine positions he reviewed at the request of the Employer to determine if the physical demands of the jobs were within Claimant’s

5, 2000 Employer submitted its post hearing brief, which included two attachments: (1) the ILA contract which Claimant agreed to stipulate to in lieu of the deposition of Charles Spencer, and the wage records of Issac Young for the period 9/1/98 through 1/31/99. These documents are marked and admitted as Employer's exhibits 2 and 3 respectively. Claimant submitted his post hearing brief on December 29, 1999, and appended wage data for the period 8/1/98 through 2/28/99 which is hereby admitted as Claimant's exhibit 4.

Claimant seeks permanent partial disability benefits under the Act, for injuries sustained to his neck, i.e., compensation for loss of wage earning capacity due to his injury. Claimant alleges that the only lasher job he has been able to secure and perform is on car ships, and that the overtime and pay in that job is substantially less than lashers on container ships. Since his injury, Claimant has worked primarily as a header on car ships. According to Claimant, more hours are worked loading and unloading container ships, and all work over eight hours is paid at the overtime rate. He alleges that he cannot make as much money as a car ship lasher as he made prior to his injury. Additionally, Claimant argues that the higher paying position of header on container ships was not available to him due to his seniority status.

The Employer does not dispute that Claimant could not return to work as a lasher in container operations. It contends, however, that he could have returned to work in August of 1998 as a header on container ships where he would have made more money. Employer maintains that Claimant limited his employment to lower paying jobs on car ships and that it was his lack of diligence which rendered him unable to secure post injury wages comparable to his pre-injury wages. Employer alleges that it was Claimant's responsibility and not the Employer's to decide whether he would work header on containers. Claimant counters that, although he sporadically worked as header in container operations, he was not placed on the header list, and that the decision to allow him to become a header in container operations was a joint of the union and the employer.

Stipulations

The parties have stipulated, and based on the record evidence, I find that: (1) The Act applies, (2)the Claimant and the Employer were in an employer-employee relationship at the time of the accident/injury (3) the accident/injury arose out of and in the scope of employment, (4) timely notice of injury was given to the Employer, (5) the injury occurred
on October 17, 1997, (6) the Claimant filed a timely claim,(7) medical compensation benefits in the amount of $6,203.53 were paid under Section 7 of the Act, (8) Employer paid temporary total disability payments

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capabilities.

totaling $25,728.85[2],(9) Claimant's average weekly wage was $1,442.15, (10) Claimant has returned to regular employment with Employer.

Issues

The issues remaining for resolution are:

1. Whether Claimant is permanently partially disabled as a result of his neck injury?[3]

2. Whether Claimant has sustained a loss in wage earning capacity?

Summary of Evidence

Isaac Young has worked as a longshoreman for approximately 21 years. (Tr. 13) He is a member of the International Longshoremans' Association and carries an "I" card.[4] On October 17, 1997, while working as a lasher of Stevens Shipping & Terminal Co., a lashing rod weighing approximately 35-50 pounds fell from the corner of a container, hitting Claimant in the back of his neck.[5] (Tr. 14).

Claimant was initially treated at Baptist/St. Vincent's Hospital and subsequently came under the care of Dr. Gregory C. Keller, an orthopedic surgeon, who diagnosed contusion, chronic neck pain of unknown etiology. Claimant underwent physical therapy. He was released by Dr. Keller for return to work on in November of 1997 at the medium work level. Because of continued complaints of neck pain, Dr. Keller imposed light work restrictions in December of 1997, with a twenty pound maximum lifting restriction. On February 3, 1998, Claimant was returned to work by Dr. Keller with no restrictions, and on April 2, 1998 Dr. Keller found that he had reached maximum medical improvement (MMI) with a 3% impairment and returned him to modified duty.

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[2] Temporary total disability was paid in the amount of $835.74 from November 14, 1997 to February 2, 1998, and April 22, 1998 to September 6, 1998.

[3] This is an unscheduled injury and therefore is covered under Section 8(c)(21) of the Longshore and Harbor Workers' Compensation Act.

[4] An "I" card entitled Claimant to certain preferences in hiring for jobs posted by the union. TR 24-32.

[5] A lasher secures container loads on a vessel using lashing rods and turnbuckles. The job requires overhead work, and the rods weigh 40-50 pounds, and turnbuckles weigh about 25-30 pounds. Lashers also work on car ships, loading and unloading (Tr. 13-15), but he does not use a lashing rod and is not required to perform overhead work.

The employer voluntarily made temporary total disability payments form November 14, 1997 to February 2, 1998, and from April 22, 1998 to September 6, 1998.

Dr. Gregory C. Keller, an orthopedic surgeon, treated Claimant between November 14, 1997 and April 2, 1998. In the November 14, 1997, Dr. Keller initially diagnosed contusion, with chronic neck pain of unknown etiology. Claimant underwent physical therapy for eight weeks and was released by Dr. Keller to return to work at the light duty work level on December 30, 1997. On February 3, 1998, Dr. Keller lifted his work restrictions and returned Claimant to his usual work duty. On April 2, 1998, Dr. Keller reported that Claimant's complaints of pain persisted without any evidence of significant injury. He found that Claimant had reached MMI from an orthopedic standpoint. With regard to his continued neck pain, Dr. Keller could not offer further treatment, except to prescribe anti-inflammatory medication (motrin). He rated Claimant's impairment at 3% percent and returned him to modified duty. (CX 2). On April 22, 1998, Dr. Keller completed an MMI Permanent Impairment Determination Certification Form, reiterating his three percent disability rating.

Claimant continued to complain of intermittent neck pain, neck spasms, and headaches with pain extending to his shoulders, left greater than right. He was referred to Dr. Fady A. El-Bahri, an orthopedic surgeon, for a second opinion. After his examination on April 14, 1998, Dr. Fady A. El-Bahri's impression was cervical sprain, rule out HNP (herniated nucleus pulposous). He recommended a MRI, and referral to a neurologist for the ongoing complaints of headaches. Claimant was continued in his current work status. (CX 1) On April 22, 1998, Dr. El-Bahri reviewed the results of an MRI dated April 20, 1998, which was unremarkable, with the Claimant. His impressison remained cervical sprain. Dr. El-Bahri indicated that Claimant could continue working with the restriction of no overhead work. (CX 1). Thereafter, Dr. El Bahri saw the Claimant on May 27, 1998, August 13, 1998, and September 23, 1998. His diagnosis remained unchanged and he reemphasized Claimant's work restriction of no overhead work and no lifting over twenty pounds. (CX 1). Dr. Bahri indicated that Claimant had reached MMI on August 13, 1998.

On October 16, 1998, Claimant was examined by Dr. Jawed Hussain, who specializes in physical medicine and rehabilitation. (EX 2 at p.4) Dr. Hussain reviewed Claimant's past medical history, social history, previous medical records of Drs. Keller and Bahri, conducted his own physical examination, and noted Claimant's complaints of pain and his current medications. Dr. Hussain diagnosed myofascial pain syndrome, chronic pain syndrome and cervical strain. Dr. Hussain noted the finding of maximum medical improvement rendered by Drs. Keller and Bahri. Dr. Hussain opined that Claimant should continue work on the modified work status recommended by Dr. Keller, and agreed with Dr. Keller's MMI date of April 2, 1998, was correct. EX 2).

Dr. Hussain prepared a "Work Status Form", dated December 9, 1998, in which he indicated that Claimant had reached MMI, and restricting him

to lifting a maximum twenty pounds. Subsequently on February 21, 1999, a similar form was issued by Dr. Hussain which noted that MMI had been reached and Claimant was restricted to light work.[6] (EX 2).

The record includes the office notes of Dr. Hussain, for November 12, 1998, December 9, 1998, January 27, 1999, and February 23, 1999, which report substantially the same information from visit to visit and document Claimant's continued to complaints of pain. Dr. Hussain's impression remained: sprain and strain of the myeloligamentous supporting structures of the cervical spine, chronic pain syndrome, and myofascial pain syndrome. (EX 2).

Claimant's Testimony

Claimant testified that, since his released by Dr. Bahri, in August of 1998, he has worked constantly when work was available and he had sufficient seniority to be reached. (Tr. 21) He worked as a header, a van driver on the car ships, and as a flagman. (Tr. 19) These jobs were within his medical restrictions. These jobs are lift truck driver (warehouse operation), auto flagman/traffic director, tug operator, warehouse/driver hostler (auto ship); flagman, auto driver, van driver, header (container ship). Most of his work has been on the car ships, although he worked as a header, flagman, and foreman sometimes on container ships (Tr. 20). The lasher job on car ships does not require the use of a rod or overhead work, and Claimant does not dispute that he can work as lasher on car ships.

He testified further that overtime opportunities on the car ships is not a great as that on the container ships, and that he made considerably more money before he was injured because he worked container vessels, and more overtime (Tr. 23)

Claimant testified that he could work the jobs identified in Employer's Job Analysis reports except for the warehouse hustler job and the footman in container operations. (Tr. 29)

Claimant indicated that he had a constant nagging pain in his neck, His medications include Flexeril (muscle relaxant) which causes drowsiness and sleepiness. He does not take the medication on the days he works.

Vocational Evidence

Dr. Hussain reviewed a series of job analysis reports, which detailed the functions, physical demands and environmental conditions of

[6] This form was somewhat ambiguous since it appeared that Dr. Hussain may have checked near the box marked "sedentary work", or that a poor copy may have marked the paper. After careful review of the form and the written notation stating "No Change [in] work Limitation" I find that Dr. Hussain intended to give Claimant a light work restriction.

nine jobs. Dr. Hussain approved eight of the jobs as positions he believed were within Claimant's physical limitations. These job analysis reports are included in the record as an exhibit to Dr. Hussain's deposition, dated March 31, 1999. See Exhibit 2, to Hussain Dep.

DISCUSSION

In arriving at a decision in this matter, the administrative law judge is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw her own inferences from it; and she is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmer's Association, Incorporated, 390 U.S. 459 (1968); reh'g denied, 391 U.S. 929 (1968). Moreover, the administrative law judge, as finder of fact, is entitled to consider all credible inferences and can consider any part of an experts testimony or she may reject it completely. See generally Avondale Shipyards, Incorporated v. Kennel, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Circuit 1990). The Longshore and Harbor Workers' Compensation Act is to be liberally construed, Director, OWCP v. Pirini N. River Associates, 459 U.S. 297, 315-16 (1983), and claimants are to be accorded the benefit of all doubts. Durrah v. WMATA, 760 F.2d 320 (D.C. Circuit 1968); Strachan Shipping Company v. Shea, 406 F.2d 521 (5th Circuit 1969), cert. denied, 395 U.S. 921 (1970).

The parties have stipulated, and I find that the record evidence corroborates, that Claimant injured his neck in the course of his employment, that Employer had timely notice of such injury, and authorized medical care and treatment, and has paid compensation benefits to Claimant for his periods of temporary total disability resulting from the injury, that Claimant timely filed benefits once a dispute arose between the parties. Thus, the principal issues are the nature and extent of Claimant's disability and whether Claimant has sustained a loss of wage earning capacity.

I. Nature and Extent of Disability

Extent of Disability

Concerning the issue of the nature and extent of a disability, in order to establish its prima facie case, the claimant has the initial burden of proving the inability to return to his former work. Carroll v. Hanover Bridge Marina, 17 BRBS 176 (1985); Huningman v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 141 (1978). Claimant need not establish that he cannot return to any employment only that he cannot return to his former employment. Elliott v. C & P Tel. Co., 16 BRBS 89 (1984). The claimant's credible complaints of pain may be enough to meet this burden. Anderson v. Todd Shipyard Corp., 22 BRBS 20 (1989); Richardson v. Safeway Stores, 14 BRBS 855 (1982); Miranda v. Excavation Constr., 13 BRBS 882, 884 (1981). On the other hand a judge may find an employee able to do his usual work despite his complaints of pain,

numbness and weakness, when a physician finds no functional impairment. Peterson v. Washington Metro Area Transit Auth., 13 BRBS 891 (1981).

Claimant, in the hearing and through other documents presented to the court, has made credible complaints of pain. In addition Drs. El-Bahri, Keller, and Hussain, have opined that Claimant is suffering from injuries associated with his October 17, 1997, accident. These doctors have placed limitations on Claimant which preclude him from returning to his work as a lasher (container operations). The physicians also agree that Claimant has reached maximum medical improvement.[7] Their respective opinions are credible and convincing, and I find that Claimant has demonstrated his prima facie case of permanent total disability based on the medical evidence and testimony herein.

Suitable Alternate Employment

Where as in the instant case, the claimant establishes a prima facie case of total disability, the burden shifts to employer to establish suitable alternate employment. An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. The judge must allow the employer to present evidence as to the availability of the of suitable alternative employment, even if the employer does not have information as to the job's previous availability. Lucus v. Louisiana Insurance Guaranty Association, 28 BRBS 1 (1994).

The employer must demonstrate that specific job opportunities exist which the injured employee could perform considering the claimant's age, education, work experience, and physical restrictions. Edwards v. Director, OWCP, 99 F.2d 1374 (9th Circuit 1993); cert. denied, 114 S.Ct. 1539 (1994). Further, Employer must identify specific available jobs; labor market surveys are not enough. Campbell v. Lykes Brothers Steamship Company, 15 BRBS 380, 384 (1983); Kimmel v. Sun Shipbuilding & Dry Dock Company, 14 BRBS 412 (1981). Williams v. Halter Marine Services, 19 BRBS 248 (1987) (must be specific, not theoretical, jobs).

The only vocational information submitted in this matter was in the form of a job analysis report. This report demonstrates the physical requirements of the jobs, the tools used in the job, the educational and skill requirements, and environmental conditions. This report was

[7] While all of the medical testimony demonstrates that MMI has been reached there is some question as to the precise date. Dr. Bahri, in an August 13, 1998 report, found that MMI has been reached. (CX 1). Drs. Keller and Hussain are in agreement that MMI was reached on April 2, 1998. (EX 2; CX 2). I concur with the findings of Drs. Keller and Hussain and find that MMI was reached on April 2, 1998.

submitted post hearing along with the deposition of Dr. Jawed Hussain.[8] In the deposition, it is cursorily referenced relating to Dr. Hussain's approval of the positions as suitable for Claimant and within his medical restrictions. No other cover letter was appended to this document with any further description. Employer did not produce a witness during the hearing, to testify regarding the specific availability of any of the jobs referred to in the report during the relevant period. Thus, these job analysis reports, while admitted, do not demonstrate that there were specific jobs available which Claimant could secure and reasonably perform. Therefore, I find that employer has not demonstrated the availability of actual jobs within Claimant's physical capabilities or realistic employment opportunities. See Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988); Price v. Dravo Corporation, 20 BRBS 94 (1987); Rieche v. Tracor Marine, 16 BRBS 272 (1984); Daniele v. Bromfield Corporation, 11 BRBS 801 (1980).

However, the fact that Claimant returned to work with the Employer as a Header on car ships in August of 1998, is sufficient to demonstrated that suitable alternate employment did exist. Thus, Claimant, at most, would be entitled to permanent partial disability following his return to work in August of 1998.

The pivotal issue, as both parties agree, is whether Claimant has sustained a loss in wage earning capacity, which would entitle him to permanent partial disability benefits. See 33 U.S.C. §§ 908(c); Southern v. Farmers Export Company, 17 BRBS 64 (1985).

Claimant returned to work, when released by his physician, and continues to work for the Employer as a Header (car ships) earning $1,007.98 per week.[9] Employer contends that the testimony of Mr. Ronald Bouchelle's establishes that Claimant had the final decision on whether he wanted to work as header on a container ship, where he could make at least as much as he did prior to his injury. (Tr. 74-77). Furthermore, Employer alleges that Claimant voluntarily did not make this decision and settled for less money working on the car ships where he could earn at least as much money as he did prior to his injury. Employer argues that since Claimant did not make his decision until the date of the

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[8] The report was identified as an exhibit to Dr. Hussain's deposition, at the time of the deposition and was submitted by Employer post hearing by leave of the Court.. (TR 6-7).

[9] Exhibit "1" of Claimant's post-hearing brief is a printout detailing Claimant's wages as recorded by the International Longshoreman Association's Welfare and Pension Administration. The weekly wage is derived by taking the number of days between August 16, 1998 and February 28, 1998, 196 days or 28 weeks. These days are representative of the span of time reported in the printout. Claimant earned a total of $28,223.47. $1007.98 is the quotient of his total salary for the period divided by the number of weeks.

hearing, Claimant did not diligently seek employment.

Mr. Bouchelle, Employer's Safety Director, testified that the decision as to whom will be selected for header jobs is maded by union officials and the management for the companies. Specificially, the company selects certain employees whom they want to place in header vacancies when one becomes available, and submits the names to the union for approval. The union may also have persons it wants considered for the header vacancies and those names would be taken under consideration by both management and union and an agreed upon list of eligible employees would be selected. (Tr. 63, 79) After the list of selectees is prepared, the employees are notified and given an opportunity to decide whether they want to work car ships or container operations. According to Mr. Bouchelle, Claimant's name was placed on the header list of March 17, 1999, a month prior to the hearing. (Tr. 72) Until March 17th, the union and management officials had not made a decision and Claimant rotated between the three categories of headers he was eligible to fill. According to Claimant, this work as a header was as a substitute, and was qualifying work which would prepare him for selection as a full time header. (Tr. 77). While Employer claims that as of the date of the hearing he had not made a determination as to whether he wanted to work car ships or container ships (Tr. 72), Claimant's testimony indicates that Claimant had not been informed that he had been selected for a full time header position, and that the time for election between car ship and container ship had not occurred. This testimony is in direct conflict with that of Mr. Bouchelle, who testified that Claimant's name would not be on the March 17th header list of container operations if the Company's president, Mr. Spencer had not notified him of his selection. In the absence of testimony from Mr. Spencer, the person with personal knowledge of the relevant facts relating to notification to Claimant of his selection, I credit the testimony of the Claimant over that of Mr. Bouchelle.[10]

The record reveals that Claimant was diligent in his efforts to secure available work, and there is not evidence in the record which would substantiate the broad allegation that Claimant could have earned more during the relevant period. Inasmuch as Claimant's testimony indicates he was willing to take the header job in container operations when notified, I find that Claimant did sustained a loss of wage earning capacity from September 6, 1998 - the date temporary total disability payments ceased - until March 17, 1999, the date Claimant was informed at the hearing of his selection as a full time header on container vessels.[11]

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[10] I note that counsel for Employer requested leave to submit the deposition of Mr. Spencer, post hearing, to address this issue, but that such deposition was not submitted.

[11] I find that Claimant did diligently seek employment. The record and the evidence shows that Claimant returned to work as soon as possible after his injury. The fact that Claimant did not make

Compensation Rate

Claimant, who continues to work for the Employer, is a Header and makes $1,007.98 per week. Exhibit "1" details Claimant's wages, following his injury and return to work, and is based on the records of the International Longshoreman Association's Welfare and Pension Administration. The weekly wage is calculated by taking the number of days between August 16, 1998 and February 28, 1998, 196 days or 28 weeks. These days are representative of the span of time reported in the printout. Claimant earned a total of $28,223.47. $1007.98 is the quotient of his total salary for the period divided by the number of weeks, and represents his weekly wage earning capacity.

I find that Claimant is entitled to permanent partial disability benefits at the compensation rate of rate of 66 2/3 per centum of the difference between his average weekly wage of $1442.5 as stipulated to by the parties, and his post injury wage earning capacity ($1,000.98) for the period commending September 6, 1998 and continuing until April 7, 1999.

Interest

The Benefits Review Board has held that Claimant is entitled to appropriate interest on any accrued unpaid compensation benefits. Watkins v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 556 (1978), aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP, 594 F. 2d 986 (4th Cir. 19798); Santos v. General Dynamics Corp., 22 BRBS 226 (1989). Accordingly, Claimant is entitled to interest on all unpaid disability benefits, beginning on the date that such benefits were due and computed at the rate prescribed by 28 U.S.C. §1961. See Grant v. Portland Stevedoring Co., 16 BRBS 267, 270 (1984, modified on recon.,17 BRBS 20 (1985).

Attorney's Fees and Costs

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his decision to work on container ships as a header for one month, when considered in light of all the confusion surrounding that process, suggests that other factors, not claimant's diligence, were the cause of the delay. See also Durosier v. Newport News Shipbuilding and Dry Dock Co., 1998-LHC-0914 (April 20, 1999)(finding that claimant diligently sought work and showed a willingness to work where employment was secured withing two months). Claimant worked as often as his seniority would allow or work was available after his injury. His eligibility to work as a header in container operations was not a decision he could make initially. Under the labor contract and by local practice, it appears that the determination of his initial eligibility was a decision which had to be made by management and labor officials jointly. That decision was not finalized until March 17, 1999 and Claimant's first notice of that decision was apparently the date of the hearing.

Since Claimant is entitled to benefits under the Act, his attorney is entitled to a reasonable and necessary fee and costs, substantiated by an itemized fee petition. 33 U.S.C. §928. Such fee petition must meet the requirements set forth in 20 C.F.R. §702.132 and shall be submitted within sixty (60) days of receipt of this Decision and Order. A copy of the fee petition shall be served on Respondent's counsel who shall have thirty (30) days from receipt to respond to the fee petition. The petition for approval of a fee shall identify each document by date and a description for which a charge for receipt/review/filing is made and should be listed on a line by line basis. Likewise, a separate, descriptive listing shall be made for each telephone call/conference. All other entries shall be identified on a line by line basis (when charges appear to be duplicative, such as second and subsequent entries for research, preparation, etc., petitioner shall explain the necessity for such duplication or continuing services). Any objection filed by Employer shall be specific, as opposed to general, and shall be on a line by line basis.

ORDER

It is therefore ORDERED that:

1. Stevens Shipping and Terminal Company will pay to Isaac Young permanent partial disability benefits commencing on September 6, 1998 and continuing until April 7, 1999; such compensation to be computed at the maximum weekly compensation rate of compensation rate of rate of 66 2/3 per centum of the difference between his average weekly wage of $1442.5 as stipulated to by the parties, and his post injury wage earning capacity ($1,000.98) for the period commencing September 6, 1998 and continuing until April 7, 1999;

2. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this decision and order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally to be paid. See Grant v. Portland Stevedoring, 16 BRBS 267 (1984).

3. Pursuant to Section 7 of the Act, Employer Stevens Shipping & Terminal Company shall pay medical benefits related to this claim;

4. All calculations necessary to effectuate this order shall be made by the District Director.

SO ORDERED

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MOLLIE W. NEAL
Administrative Law Judge

Dated: July 31, 2000
Washington, D.C.